No. 87-6796 (6)

In The

Supreme Court of the United States

October Term, 1990

JAMES A. FORD,

Petitioner,

v.

GEORGIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF FOR THE PETITIONER

CHARLES J. OGLETREE*
Harvard Law School
208 Griswold Hall
Cambridge, MA 02138
(617) 495-5097

BRYAN A. STEVENSON
Southern Prisoners Defense Committee
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

JAMES E. COLEMAN, JR.
JOSEPH E. KILLORY, JR.
DEREK S. SELLS
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30

QUESTIONS PRESENTED

1. DID THE GEORGIA SUPREME COURT FAIL TO COMPLY WITH THIS COURT'S REMAND ORDER REQUIRING RECONSIDERATION OF PETITIONER'S CASE IN LIGHT OF *GRIFFITH v. KENTUCKY*?

2. CAN THE RULE OF RETROACTIVITY ESTABLISHED IN *GRIFFITH* BE DEFEATED BY A STATE APPELLATE COURT'S *POST HOC* INVOCATION OF A PREVIOUSLY UNANNOUNCED STATE PROCEDURAL RULE AS A BAR?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The Georgia Supreme Court opinion which formed the basis of Petitioner's first petition for certiorari is reported at 335 S.E.2d 567 (Ga. 1985). (Joint Appendix at 22-48, hereinafter J.A."). This Court's grant of certiorari and remand to the Georgia Supreme Court was announced on February 23, 1987, and is reported at 479 U.S. 1075 (1987). (J.A. 49). The opinion of the Georgia Supreme Court following remand from this Court was issued on November 30, 1987, and is reported at 362 S.E.2d 764 (1987). (J.A. 50-58). The Georgia Supreme Court denied rehearing on February 15, 1988.[1] This Court granted certiorari on April 23, 1990. 110 S. Ct. 1921 (1990) (J.A. 59).

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1257(a), as Petitioner asserted below and asserts in this Court a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

---

[1] Rehearing was initially denied on December 16, 1987, but that order was vacated because counsel for Petitioner had not been notified of the decision.

The Fourteenth Amendment provides:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioner is a black man convicted in 1984 of the murder of a white store owner and sentenced to death by a petit jury from which nine of the ten black venire members were struck peremptorily by the prosecutor.

Prior to his trial, Petitioner filed a motion "to restrict racial use of peremptory challenges" to "exclude members of the black race from serving on the jury." (J.A. 3-4). In support of his motion, Petitioner alleged that the prosecutor "has over a long period of time excluded members of the black race from being allowed to serve on the Jury where the issues of the trial involved members of the opposite race." *Id.* at 3. After pointing out that his case involved a black defendant and a white victim, Petitioner stated that "[i]t is anticipated that the Prosecutor will continue his long pattern of racial discrimination in the exercise of his peremptory strikes." *Id.* at 4.

The trial court addressed Petitioner's motion at a pretrial hearing. Petitioner's counsel stated, "it's been my experience, and the Court is aware that the district attorney and the other assistant district attorneys have a history and a pattern when you have a defendant who is black, of using their peremptory challenges to excuse potential jurors who are also black." (J.A. 10). In light of

that experience, counsel specifically requested that the court require the prosecutor to justify on the record the reasons for using any peremptory challenge to excuse potential black jurors. Otherwise, counsel argued, the inference would persist that the prosecutor was using peremptory challenges to excuse jurors "solely because they are black and for no other reason." *Id.* The prosecutor opposed the motion on the ground that *Swain v. Alabama*, 380 U.S. 202 (1965), permitted the use of peremptory challenges to exclude members of the venire for any purpose, including "because they have blue eyes." *Id.* at 11.

The trial judge denied the motion, noting that in his experience he had seen "cases in which there . . . have been black defendants and the district attorney's office has struck prospective white jurors and left prospective black jurors on the jury . . . . I don't know why. Maybe it just happens because the person struck was just sorry or for one reason or another . . . . I'm taking that into consideration among other things and denying the motion to restrict racial use of peremptory challenges." *Id.* at 11-12.

Although no transcript exists of the later portion of the proceedings at which the prosecutor exercised his peremptory challenges and the jury was sworn, there is no dispute that the prosecutor used nine of his ten peremptory challenges to strike black prospective jurors.[2] As a consequence, the jury that convicted and sentenced

[2] *See* J.A. 25 and *Ford v. State*, 335 S.E.2d 567, 572 (Ga. 1985).

Petitioner to death had eleven white members and one black member.

Shortly after the trial began, during a conference in chambers, the judge referred to an earlier motion made by Petitioner that was directed "to the State's using all their strikes to strike blacks from being on the jury; no whites being struck, all blacks being struck." (J.A. 15). The court noted, however, that one black juror was seated, and that another black prospective alternative juror had been struck by the defense. The Court then concluded:

> *That's what happened in the jury selection process.* I think that needs to be put in since that motion was made. Of course, the motion has been denied. It doesn't matter now but I think *just for the record's sake* that ought to be done . . .

(J.A. 15-16; emphasis added).[3] In response to the Court's comments, the prosecutor asked if "it would be appropriate for the State to make any kind of showing as to why

---

[3] Since the proceedings on Petitioner's pretrial motion to restrict the prosecutor's use of peremptory challenges in a discriminatory manner was on the record, *see* J.A. 3-4 and 10-12, this statement suggests that the court may have been referring to a motion that was made during the jury selection portion of the trial, when the prosecutor used his peremptory challenges; those proceedings were not on the record. *See* J.A. 12-13. At the hearing on the motion for a new trial, Petitioner's counsel also referred to the colloquy in chambers as concerning petitioner's objection "to the use of peremptory challenges by the district attorney on the basis that he was excusing black people on a basis of racial bias alone. . . . " (JA. 17). Counsel described this objection as having been "re-assert[ed]." *Id.* at 18.

those challenges were used?" (J.A. 16). The court replied that it was not "asking for such a showing to be made." *Id.*

The issue of the state's use of peremptory challenges to strike potential black jurors was raised again in Petitioner's motion for a new trial. At the hearing on that motion, Petitioner's counsel specifically referred to Petitioner's objection "to the use of peremptory challenges by the district attorney on the basis that he was excusing black people on a basis of racial bias alone. . . . " (J.A. 17). The motion was denied.

On appeal to the Georgia Supreme Court, Petitioner assigned error to the trial court's denial of his motions attacking the prosecutor's use of peremptory challenges. Petitioner argued that it was time for the Georgia Supreme Court to "[re]examine its previous position" on *Swain*, which was "no longer a viable basis for sanctioning clearly biased use of peremptories." Brief for Appellant at 7, *Ford v. State*, 335 S.E.2d 567 (Ga. 1985). Petitioner pointed out that he had made a timely objection and noted that the "prosecutor had used nine of his ten (90%) peremptories to strike black prospective jurors in a case where there was a white victim and a black defendant." *Id.* at 9.

The Georgia Supreme Court affirmed Petitioner's conviction. The court characterized Petitioner's *Swain* challenge as being directed at "the prosecutor's use of peremptory strikes to remove 9 of 10 possible black jurors . . . . " *Ford v. State*, 335 S.E.2d 567, 572 (Ga. 1985). The court concluded that Petitioner had failed to show a violation of any constitutional right because his evidence went only to the racially discriminatory use of peremptory challenges in the selection of *his* jury, and not the

district-wide pattern of discrimination then required by *Swain* and its progeny:

> Ford has shown only that a large percentage – but not all – of black prospective jurors were peremptorily struck by the prosecution in *this* case. 'He has failed to establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial juries in the circuit.' *Moore v. State*, 254 Ga. 525, 529(2(b)), 330 S.E.2d 717 (1985). Accordingly we find no error here.

Id. (Emphasis in original).

Petitioner filed a petition for a writ of certiorari in this Court on January 22, 1986. The Court decided *Batson v. Kentucky*, 476 U.S. 79, on April 30, 1986, recognizing a criminal defendant's right to challenge a denial of equal protection by showing that the prosecutor had excluded black persons from serving on the petit jury in the defendant's own case on the basis of their race. On January 13, 1987, the Court decided *Griffith v. Kentucky*, 479 U.S. 314, holding that the new evidentiary standard announced in *Batson* would apply to all criminal cases then pending in which a judgment of conviction had not become final: "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . . " *Id.* at 328. The Court then granted certiorari in Petitioner's case, vacated the judgment of the Georgia Supreme Court, and remanded the case for further consideration in light of *Griffith*.[4]

---

[4] The Court's order in *Ford v. Georgia*, 479 U.S. 1075 (1987), recited that the judgment of the Georgia Supreme Court was

(Continued on following page)

On November 30, 1987, the Georgia Supreme Court *sua sponte* held that Petitioner's challenge to the prosecutor's discriminatory use of peremptories was procedurally barred. *Ford v. State*, 362 S.E.2d 764 (Ga. 1987), *cert. granted*, 110 S. Ct. 1921 (1990). The court neither requested briefing nor heard argument. In finding a procedural default, the court relied on its May 19, 1987, decision in *State v. Sparks*, 355 S.E.2d 658 (Ga.), a decision it rendered 30 months after Petitioner's trial concluded, and 19 months after the Georgia Supreme Court had first affirmed Petitioner's conviction.[5] The court concluded that because, in its view, Petitioner had not complied with the requirement first announced in *Sparks* by making an objection to the alleged discriminatory use of peremptory challenges after the jury was selected but before it was sworn, Petitioner was barred from pursuing any claim he may have had under the standards announced in *Batson*. Two justices dissented, noting:

> Because the procedural rule on which the majority relies to avoid reaching the merits of Ford's *Batson* claim did not exist when Ford's case was tried, it cannot possibly be "the sort of firmly established and regularly followed state practice that can prevent implementation of [Ford's] federal constitutional rights." *James v.*

(Continued from previous page)

"vacated and [the] case remanded for further consideration in light of *Griffith v. Kentucky* . . . . "

[5] Significantly, *Sparks* found that no state procedure for raising *Batson* claims had previously been established, but that "*hereafter* any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn." 355 S.E.2d at 659 (emphasis added).

Kentucky, 466 U.S. 341, 104 S. Ct. 1830, 80 L.E.2d 346 (1984).

362 S.E.2d at 767 (Gregory, J., dissenting). The Georgia Supreme Court denied reconsideration on February 15, 1988.

This Court granted certiorari on April 23, 1990, "limited to Questions 1 and 2 presented by petition." 110 S. Ct. 1921 (1990) (J.A. 59).

SUMMARY OF ARGUMENT

The Georgia Supreme Court, in holding that Petitioner was procedurally barred from pursuing his repeatedly asserted constitutional objection to the prosecutor's racially discriminatory use of peremptory challenges, ignored the remand mandate of this Court and the requirement of *Griffith* that *Batson* be applied retroactively. The procedural rule upon which that court relied is not an independent and adequate state ground for avoiding a decision on the merits of Petitioner's claim.

Notwithstanding the mandate of *Griffith*, the Georgia Supreme Court here declined to apply *Batson* to Petitioner's case. Instead, invoking a contemporaneous objection rule, and acting without the benefit of briefing or oral argument, it denied Petitioner even a hearing into the basis for the prosecutor's peremptory exclusion of nine of the ten black prospective jurors in his case. The Georgia court held that Petitioner's objection to the prosecutor's racially discriminatory use of peremptory challenges – an objection first made by Petitioner before trial and repeated during the trial and at every stage of his

appeals – did not comply with the expressly prospective procedural requirements adopted in *State v. Sparks*, 355 S.E.2d 658 (Ga. 1987), a decision that came 30 months after Petitioner's trial.

Petitioner objected to the prosecutor's racially discriminatory use of peremptory challenges, and did so in a manner that satisfied the evidentiary and procedural requirements that governed such objections at the time of his trial. Neither the trial court, nor the Georgia Supreme Court in denying Petitioner's first appeal, found any procedural fault with the manner in which Petitioner raised his constitutional claim. To the contrary, the Georgia Supreme Court denied that portion of his appeal on the stated ground that the evidence presented by Petitioner concerned discrimination only "in *this* case" and not the district-wide pattern required by *Swain*. *Ford v. State*, 335 S.E.2d 567, 572 (Ga. 1985) (emphasis in original). In short, Petitioner fully complied with then prevailing Georgia law in challenging the prosecutor's use of race in selecting his jury, and attempted to prove those allegations relying upon just the kind of evidence later found to be appropriate in *Batson*.

The Georgia Supreme Court's conclusion that Petitioner failed to preserve a *Batson* objection, notwithstanding the clear statement of his claim in the trial court, is based upon the critically flawed premise that *Batson* and *Swain* involve different constitutional claims. In fact, however, *Batson* and *Swain* define the same constitutional claim, under different evidentiary standards, and the Georgia court's holding to the contrary completely eviscerates the mandate of this Court.

Properly viewed, this Court's holding in *Griffith* requires the application of *Batson* in cases pending on direct appeal in which the defendant has raised an objection to racially discriminatory use of peremptory challenges, regardless of the evidentiary standard under which that objection was made. The procedural rule announced in *State v. Sparks* is not an independent and adequate state ground for avoiding the mandate of *Griffith* in this case. To the contrary, the application of a procedural rule first announced more than two years after Petitioner's trial violates "basic norms of constitutional adjudication." *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987).

ARGUMENT

I. THE DECISION BELOW IS INCONSISTENT WITH THE RULE OF *GRIFFITH* THAT *BATSON* BE APPLIED RETROACTIVELY

Although the basis for its disposition is far from clear, the Georgia Supreme Court, in refusing to follow this Court's mandate on remand, apparently acted on the mistaken notion that an equal protection claim under *Swain* was substantively different from one under *Batson*. *Griffith v. Kentucky*, 479 U.S. 314 (1987), however, makes clear that no such distinction exists; indeed, all that the Court decided in *Griffith* was that the evidentiary standard announced in *Batson* would be applied retroactively to *Swain* claims pending at the time *Batson* was decided. Thus under *Griffith* and this Court's remand in this case, a perceived difference in claims under *Swain* and *Batson* does not support the Georgia Supreme Court's refusal to evaluate the constitutionality of Petitioner's conviction under *Batson*.

In *Griffith*, this Court "granted certiorari . . . limited to the question [of] whether the ruling in *Batson* applies to a state conviction pending on direct review at the time of the *Batson* decision," and decided that it did. 479 U.S. at 318. Specifically, this Court held that " . . . a new rule for the conduct of criminal prosecutions is to be applied retroactively *to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.*" *Id.* at 328 (emphasis added). Thus, since Petitioner's *Swain* claim was on direct appeal to this Court when *Batson* was decided, "it is . . . unquestioned" that his case came within *Griffith's* ambit. *Ford v. State*, 362 S.E.2d at 765.

The Georgia Supreme Court's refusal to apply *Batson* retroactively to Petitioner's equal protection challenge to the prosecutor's discriminatory use of peremptory strikes cannot be squared with *Griffith*. As this Court recognized in *Griffith*, a "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322. Indeed, "the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Id.* at 323. However, since this Court "[a]s a practical matter . . . cannot hear each case pending on direct review," it "fulfill[s its] judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." *Id.* In this case, the Georgia Supreme Court has refused to accept that role, in

violation of "basic norms of constitutional adjudication." *Id.*

At the time of Petitioner's trial, *Swain v. Alabama*, 380 U.S. 202 (1965), established the evidentiary standard for an equal protection claim against a prosecutor's racially discriminatory use of peremptory challenges. In order to prevail under that standard, a defendant had to show "that the prosecutor . . . 'in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be,' has been responsible for the removal of qualified blacks who had survived challenges for cause, with the result that no blacks ever served on petit juries." *Teague v. Lane*, 109 S. Ct. 1060, 1066 (1989) (quoting *Swain v. Alabama*, 380 U.S. at 223). In this case, Petitioner asserted his challenge to the prosecutor's discriminatory use of peremptory strikes before trial, during jury selection, on motion for a new trial, and on direct appeal. Under Georgia law at the time of his trial, petitioner adequately preserved his claim for appeal.[6]

---

[6] Petitioner was required to satisfy three conditions to preserve his *Swain* claim for appeal. First, he had to raise the issue at trial. *Hammond v. Paul*, 290 S.E.2d 54, 55 (Ga. 1982). Second, his challenge had to be made at the first available opportunity. *Allison v. Fulton-Dekalb Hospital Authority*, 265 S.E.2d 575, 576 (Ga. 1980); *Brackett v. State*, 181 S.E.2d 380, 382 (Ga. 1971). And third, the claim had to be ruled upon by the trial court. *International Association of Bridge, Structural & Ornamental Ironworkers v. Moore*, 254 S.E.2d 438, 443 (Ga. Ct. App. 1979). Petitioner satisfied each of these requirements by: (1) filing a pretrial motion "to restrict the Prosecution from using [its] peremptory challenges in a racially biased manner that

(Continued on following page)

The Georgia Supreme Court noted in *Allison v. Fulton-DeKalb Hospital Authority*, 265 S.E.2d 575, 576 (Ga. 1980), that "[c]onstitutional challenges should be raised *as soon as the law which is subject to constitutional objection comes to the attention of the challenger's attorney.*" (emphasis added). Anticipating that the prosecutor would use his peremptory challenges in a discriminatory manner, Petitioner's counsel filed a motion prior to voir dire to challenge the practice. Petitioner thus satisfied the Georgia rule "that objections to irregularities must ordinarily be made at a time when they may be remedied, or they are waived." *Castell v. State*, 301 S.E.2d 234, 246 (Ga. 1983). This is confirmed by the fact that the Georgia Supreme Court reached the merits of Petitioner's equal protection claim on his original appeal. *Ford v. State*, 335 S.E.2d 567, 572 (Ga. 1985).[7]

(Continued from previous page)

would exclude members of the black race from serving on the jury," *Ford v. State*, 362 S.E.2d at 765 n.1 (*see also* J.A. 3-4); (2) making a pretrial objection to the prosecutor's discriminatory use of peremptory challenges at an October 12, 1984, evidentiary hearing (J.A. 10-12); (3) apparently moving to forbid the prosecutor's racially discriminatory strikes during jury selection (see page 4 and note 3 *supra*); and (4) raising the claim against discriminatory use of peremptories in a motion for a new trial and on appeal to the Georgia Supreme Court (J.A. 7-8; 17-20). Each motion was denied on the merits.

[7] By deciding the merits of Petitioner's Fourteenth Amendment claim, the Georgia Supreme Court necessarily found that all of the procedural prerequisites for raising that issue on appeal were satisfied. Specifically, the Georgia Supreme Court is "bound by the rule that [it] will *never* pass upon constitutional questions unless . . . the record [is clear]

(Continued on following page)

After the Georgia Supreme Court's decision, but before Petitioner's judgment of conviction was final, this Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), overturned that portion of *Swain* setting out the evidentiary standard for establishing an equal protection violation. Under *Batson*, a defendant could make out a prima facie showing "of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* at 96. In this way, *Batson* removed the defendant's burden of having to show that a prosecutor used his peremptory strikes discriminatorily "in case after case" with the result that "blacks never served on petit juries." *Teague, supra* at 1066. Thus, the only effect of *Batson* was to change the evidentiary standard for what previously had been a *Swain* claim.[8]

(Continued from previous page)

that the point was directly and *properly* made in the court below and distinctly passed on by the trial judge." *City of Atlanta v. Columbia Pictures Corp.*, 130 S.E.2d 490, 494 (Ga. 1963) (emphasis added).

[8] 476 U.S. 79, 101 (White, J., concurring). *See also, Teague v. Lane*, 109 S.Ct. at 1066 ("*Batson* . . . overruled that portion of *Swain* setting forth the evidentiary showing necessary to make out a prima facie case of racial discrimination under the Equal Protection Clause"). The Georgia Supreme Court itself recognized this fact in *Cherry v. Abbott*, 371 S.E.2d 852, 853-54 (Ga. 1988), where it ruled that *Swain* was the legal basis for a *Batson* claim.

Other courts in applying *Batson* also have treated it as merely changing the evidentiary standard for a claim under *Swain*. *See United States v. Hamilton*, 850 F.2d 1038, 1039-40 (4th

(Continued on following page)

Although Petitioner, in challenging the discriminatory use of peremptory challenges, obviously did not rely upon *Batson*, which had not been decided, it cannot be disputed that Petitioner nevertheless adequately alerted the prosecution and Georgia courts to his objection to that practice *in this case*. Thus, in his argument on Petitioner's "Motion to Restrict Racial Use of Peremptory Challenges," defense counsel stated:

> "We are requesting the Court to require the district attorney, if he does use his peremptory challenges to excuse potential black jurors, to justify on the record the reason for his excusing them. *His failure to do so we feel would evidence the*

(Continued from previous page)

Cir. 1988); *United States v. Tucker*, 836 F.2d 334, 337-338 (7th Cir.), *cert. denied*, 109 S. Ct. 143 (1988); *United States v. Gordon*, 817 F.2d 1538, 1541 (1987), *vacated in part on other grounds*, 836 F.2d 1312 (11th Cir. 1988); *United States v. Chalan*, 812 F.2d 1302, 1313-1315 (10th Cir. 1987), *cert. denied*, 109 S. Ct. 534 (1988); *United States v. Davis*, 809 F.2d 1194, 1202 (6th Cir.), *cert. denied*, 483 U.S. 1007 (1987); *Ex Parte Jackson*, 516 So.2d 768, 770 (Ala. 1986); *Fields v. People*, 732 P.2d 1145, 1150 and n.8 (Colo. 1987); *People v. Andrews*, 548 N.E.2d 1025 (Ill. 1989); *Love v. State*, 519 N.E.2d 563, 565 (Ind. 1988); *State v. Hood*, 744 P.2d 816, 819 (Kan. 1987); *State v. Thompson*, 516 So.2d 349, 353 (La. 1987), *cert. denied*, 109 S. Ct. 180 (1988); *Chew v. State*, 562 A.2d 1270, 1271 (Md. 1989); *Taylor v. State*, 524 So.2d 565, 566 (Miss. 1988); *State v. Antwine*, 743 S.W.2d 51, 55 (Mo. 1987), *cert. denied*, 486 U.S. 1017 (1988); *People v. Scott*, 516 N.E.2d 1208, 1210 (N.Y. 1987); *State v. Davis*, 386 S.E.2d 418, 423 (N.C. 1989), *cert. denied*, 58 U.S.L.W. 3769 (1990); *Guy v. State*, 778 P.2d 470, 475 (Okla. Crim. App. 1989); *Commonwealth v. Hardcastle*, 546 A.2d 1101 (Pa. 1988), *cert. denied*, 110 S. Ct. 1169 (1990); *State v. Jones*, 358 S.E.2d 701, 703 (S.C. 1987); *State v. Cantu*, 750 P.2d 591, 596 (Utah 1988); and *Gray v. Commonwealth*, 356 S.E.2d 157, 169-170 (Va.), *cert. denied*, 484 U.S. 873 (1987).

> *fact that he is using them in a discriminatory manner, that is, excusing jurors solely because they are black and for no other reason.*" (J.A. 10) (emphasis added).

Petitioner's argument here unmistakably anticipated the holding in *Batson* that "a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial," and that once such a showing is made, "the burden shifts to the State to come forward with a neutral explanation for challenging the black jurors." *Batson*, 476 U.S. at 96, 97.

Indeed, the state clearly understood petitioner's motion as one based on the exercise of peremptories *in this case*. In responding to the petitioner's oral argument in support of the motion to restrict the racial use of peremptories, the prosecutor relied on *Swain* as foreclosing such a challenge in this case. The prosecutor said that *Swain*

> is a Supreme Court case that says, the peremptory challenge system goes back to the common law and it would be an unreasonable burden to require an attorney for either side to justify his use of peremptory challenges; as in fact the purpose of peremptory challenges enables either lawyer to strike somebody because they have blue eyes. If this is the particular reason he wants to do that today, I would appose [sic] the motion. . . . (J.A. 11).

In addition, the Georgia Supreme Court, in rejecting Petitioner's claim under *Swain*, noted that Petitioner had "shown only that a large percentage . . . of black prospective jurors were peremptorily struck by the prosecution in

this case." *Ford v. State*, 335 S.E.2d at 572 (emphasis in original).

Thus, prior to this Court's decision in *Batson*, the prosecutor, the trial judge, and the Georgia Supreme Court all recognized that Petitioner had raised an equal protection challenge to the peremptory exclusion of blacks from the jury in his case. Thus, by failing to reexamine Petitioner's claim under *Batson*, the Georgia Supreme Court has flouted the mandate of this Court. See *Yates v. Aiken*, 484 U.S. 211 (1988)

II. THE DECISION BELOW DOES NOT REST ON ANY INDEPENDENT AND ADEQUATE STATE GROUND FOR AVOIDING THE RETROACTIVE APPLICATION OF *BATSON* IN THIS CASE.

The Georgia Supreme Court ruled that although Petitioner had made a written pretrial objection to the prosecutor's exercise of peremptory challenges to exclude virtually all black veniremen from the jury, Petitioner had not complied with a state procedural rule requiring him to assert the claim after the jury was selected but before it was sworn. However, that rule simply did not exist at the time of Petitioner's trial. Its invocation therefore does not constitute an adequate and independent state ground for the decision below.

It has long been settled that in order to justify a state court's refusal to hear a federal claim, a state procedural bar must be "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. 341, 348 (1984). *See. e.g., Williams v. Georgia*, 349 U.S. 375, 382-389 (1955); *Barr v. City of Columbia*, 378 U.S. 146, 149-150 (1964); *Hathorn v. Lovorn*,

457 U.S. 255, 262-265 (1982). Except where a state procedural rule provides an adequate as well as an independent ground for decision, the "general and necessary" principle is that "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). The "state procedural bar" invoked by the Georgia Supreme Court on remand (362 S.E.2d at 766) violates this principle for two basic reasons.

First, the *Sparks* procedure was expressly announced as a prospective rule. 355 S.E.2d at 659 ("we hold that *hereafter* any claim under *Batson* should be raised [at a specified] . . . time") (emphasis added). In the *Sparks* case itself, that procedure was not applied retroactively to bar a *Batson* claim raised by a litigant in a posture less compelling than Petitioner's. And so far as Petitioner is aware, the Georgia Supreme Court has never applied *Sparks* retroactively in any case other than his.[9] Its

---

[9] *Riley v. State*, 355 S.E.2d 66 (Ga. 1987), which was mentioned by the Georgia Supreme Court, presents a completely different situation. Riley made no pretrial motion to restrict the prosecutor's racially discriminatory use of peremptory strikes. After Riley's jury was selected but before trial began, the trial judge expressly offered Riley an opportunity to make motions or objections directed to the panel. He made none. Then, after a day of trial during which five witnesses testified, Riley belatedly moved for a mistrial because of the prosecutor's biased use of peremptories. The trial judge held the motion untimely, and the Georgia Supreme Court agreed. *Riley* is a straightforward case of untimely objection under *Allison v. Fulton-DeKalb*

(Continued on following page)

retroactive application as a procedural bar thus has no footing in any state-law rule that "has been consistently or regularly applied" by the Georgia courts. *Johnson v. Mississippi*, 486 U.S. 578, 589 (1988).

Second, as the dissenting Justices below pointed out, "the procedural rule on which the majority relies to avoid reaching the merits of Ford's *Batson* claim did not exist when Ford's case was tried." 362 S.E.2d at 767 (Gregory, J., dissenting); *accord*, *State v. Sparks*, 355 S.E.2d at 659 ("there have been no judicial guidelines regarding the time and manner in which such a claim is to be presented"). To the contrary, the only pertinent procedural requirement at that time was the rule of *Allison v. Fulton-DeKalb Hospital Authority*, *supra*, and similar cases, requiring that constitutional claims be raised at the first opportunity. Thus, when Ford made his pretrial motion to preclude unexplained prosecutorial peremptory strikes of black veniremen, "Ford had no way of knowing but what if he had waited until after the jury was selected to raise the issue, we [the Georgia Supreme Court] would have held that he waited too late." 362 S.E.2d at 767.

Georgia is, of course, wholly free to announce new procedures for raising *Batson* claims in its courts, so long as it applies those procedures prospectively. But retrospective application of the new procedures to litigants who "could not fairly be deemed to have been apprised of [their] . . . existence" does not constitute an adequate

---

(Continued from previous page)

Hospital Authority, *supra*, and cognate cases, which require that constitutional claims be raised as soon as a party becomes aware of the basis for them.

state ground for denying the constitutional rights vouchsafed by *Batson* and *Griffith*. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958); *N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 301 (1964); *see also Staub v. City of Baxley*, 355 U.S. 313, 320 (1958); *Wright v. Georgia*, 373 U.S. 284, 289-291 (1963); *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (per curiam).

The Georgia courts' handling of Petitioner's challenge to the racial use of peremptory strikes evidences the novelty of the Georgia Supreme Court's ruling. The issue of a procedural bar was never raised at the trial level, nor on direct appeal. It was only after the state supreme court was faced with this Court's remand order to apply *Batson* to facts that rather clearly established a prima facie denial of equal protection, that the first mention was made of any state procedural rule that supposedly barred consideration of Petitioner's claim.[10]

---

[10] By rejecting Petitioner's equal protection claim on an issue that was not raised either at trial or in any of the lower state court proceedings, the Georgia Supreme Court also ignored a bedrock principle of Georgia law. Namely, under Georgia law, "[t]here is no more fundamental principle of appellate practice . . . than that which precludes review of matters not placed in issue at the trial level." *Hall v. Robinson*, 300 S.E.2d 521, 524 (Ga. Ct. App. 1983). Thus, a "defense [not] advanced in the court below . . . may not now be considered on appeal," *Gator Express Service, Inc. v. Funding Systems Leasing*

(Continued on following page)

As the undisputed facts demonstrate, this is not a case in which Petitioner has tried to sandbag the prosecution by withholding a claim until late in the proceedings, or in which he failed to alert the prosecutor and trial court to a constitutional defect which, with proper notice, could have been avoided or cured.[11] *Cf. Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977). The prosecutor and the trial judge understood the basis for Petitioner's claim, even before jury selection commenced. Consequently, the state cannot now saddle Petitioner with a duty under a procedural rule that did not exist at the time of his trial. *Osborne v. Ohio*, 110 S. Ct. 1691 (1990).

The Georgia Supreme Court has suggested that the question presented in this case is "whether our contemporaneous objection rule is a valid state procedural bar to Ford's Batson complaint." *Ford v. State*, 362 S.E.2d at 766. To the contrary, the real question is whether a novel

---

(Continued from previous page)

Corp., 279 S.E.2d 332, 333 (Ga. Ct. App. 1981), nor can a party "during the trial ignore that which he thinks to be error or an injustice, take his chance on a favorable verdict, and complain later." *Gilreath v. State*, 279 S.E.2d 650, 662 (Ga. 1981), *cert. denied*, 456 U.S. 984 (1982) (*quoting Joyner v. State*, 67 S.E.2d 221, 224 (Ga. 1951)). This same principle prevents the Georgia Supreme Court from interposing a procedural bar for the first time on remand to avoid reconsideration of Petitioner's claim under the evidentiary standard established in *Batson*.

[11] This is clear not only from the judge's ruling on Petitioner's written motion, but also from his later indication, after the trial had commenced, that in his view the prosecutor's use of 9 of his 10 peremptory challenges to exclude blacks did not call for any explanation by the prosecutor of that pattern of strikes. (J.A. 16).

procedural rule, not well-established under state law, can be announced and retroactively applied so as to foreclose the vindication of federal constitutional rights that were plainly asserted at trial. The answer to *that* question is obvious. *See, N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958) ("such a local procedural rule, although it may now appear in retrospect to form a part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence."); *N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 301 (1964); *Johnson v. Mississippi*, 486 U.S. 578, 588-89 (1988) *see also, Wright v. Georgia*, 373 U.S. 284, 289-91 (1963); *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958); *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (per curiam). These decisions make clear that the state procedural ground invoked by the court below to avoid reviewing Petitioner's constitutional claim is not "adequate" and accordingly the decision of the Georgia Supreme Court cannot stand.

CONCLUSION

The judgment of the Georgia Supreme Court should be reversed and that court should be instructed to remand this case to the trial court for proceedings consistent with *Batson v. Kentucky*.

CHARLES J. OGLETREE*
Harvard Law School
208 Griswold Hall
Cambridge, MA 02138

BRYAN A. STEVENSON
Southern Prisoners Defense Committee
185 Walton Street, N.W.
Atlanta, Georgia 30303

JAMES E. COLEMAN, JR.
JOSEPH E. KILLORY, JR.
DEREK S. SELLS
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

Counsel for Petitioner

* Counsel of Record